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RCRA, Superfund & EPCRA Hotline Training Module

Introduction to:

**Statutory Overview of
CERCLA**

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STATUTORY OVERVIEW OF CERCLA

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1. INTRODUCTION

This module presents a brief overview of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), the statute through which Congress established EPA's hazardous substance release reporting and cleanup program, known as the "Superfund" program. The statute provides the legal authority and general framework for the program, while specific procedural requirements can be found in the regulations and guidance documents. It is vital that Hotline Information Specialists be knowledgeable about the statute itself because it is the primary reference used to answer questions relating to the Superfund program. This module presents information on the CERCLA statute only, not the regulations promulgated pursuant to the statute.

Each site cleanup conducted pursuant to CERCLA is unique, and must be performed in a manner that best suits site conditions. The Hotline answers questions about CERCLA statutory and regulatory requirements, and EPA policies. Complex, site-specific technical and legal considerations often dominate the decision-making process. However, the Hotline does not answer questions about the application of these requirements and policies to particular cases; that is handled by EPA program offices, including the Office of Solid Waste and Emergency Response (OSWER), the Office of Enforcement Compliance and Assurance (OECA), and the Regions.

Citations to CERCLA may be made in two ways: by title and section, as the law was originally enacted (e.g., CERCLA §103); and by title, chapter, subchapter, and section of the United States Code (U.S.C.) (e.g., 42 U.S.C. §9603), which refers to the government codification. Callers on the Hotline will use both methods of reference. Most written work at the Hotline lists CERCLA references as originally enacted, but since you will encounter both methods of citation, it is important to become familiar with the U.S. Code as well. In the U.S.C., CERCLA is found in Title 42, "The Public Health and Welfare," Chapter 103. The chapter is then divided into subchapters, which match up with the titles of CERCLA (e.g., Title I of CERCLA is equivalent to Subchapter I of 42 U.S.C. Chapter 103). The sections are broken down in the same manner as CERCLA, beginning with §9601, which corresponds to CERCLA §101; 42 U.S.C. §9602 is the same as CERCLA §102, and so on. Your copy of the statute came from the U.S.C., but the sections of the Act are also noted to facilitate easy reference. This module will refer to sections of the Act, since that is the method of citation EPA uses in directives and guidance documents.

When you have completed this module, you will be familiar with the basic structure of the Act. This should provide you with a solid foundation to build on as you progress through the Hotline's CERCLA training program. Before you begin this module, review CERCLA. In particular, you should study the table of contents found at the beginning of the statute, and the text of Title I. The Superfund Amendments and Reauthorization Act of 1986 (SARA) both amends CERCLA and incorporates free-standing statutes. This module follows the structure of the

statute's table of contents but does not address the provisions that do not amend CERCLA, such as SARA Title III (except for Title V).

2. STATUTORY OVERVIEW

The statutory "pieces" of Superfund consist of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, the Superfund Amendments and Reauthorization Act of 1986 (SARA), and subsequent reauthorization in 1990, as part of the Omnibus Budget Reconciliation Act. Together with some minor amendments, these statutes provide the legal framework and the funding authority for the program. The following public laws comprise the Superfund Program:

- Public Law 96-510 - CERCLA of 1980
- Public Law 99-499 - SARA
- Public Law 101-508 - Omnibus Budget Reconciliation Act with Amendments to CERCLA
- Public Law 100-202 - Amendments/Appropriations
- Public Law 100-647 - Amendments/Appropriations
- Public Law 101-144 - Independent Agencies Appropriations
- Public Law 102-426 - Community Environmental Response Facilitation Act.

The first federal cleanup program began in 1972 with the enactment of the Clean Water Act (CWA). Section 311 of CWA established a program for cleaning up spills of oil and hazardous substances in navigable waters. The regulations for this program became the foundation for the CERCLA program.

With the passage of time and increased knowledge about human health and the environment, the legacy of more than 100 years of industrial growth grew more apparent. Congress enacted CERCLA in 1980 in response to public outrage over the dangers posed by abandoned hazardous waste sites. The now infamous scenes of environmental disaster at Love Canal and Times Beach prompted Congress to create and give to EPA the legal tools and funding necessary to address these environmental problems. Congress established a program in CERCLA to identify sites where hazardous substances have been, or might be, released into the environment; to evaluate the dangers present; and to ensure that the sites are cleaned up by the government or the parties responsible for the contamination. Because Congress established a large trust fund in CERCLA, which is primarily funded by taxes levied on certain petroleum products and chemicals, the program became known as "Superfund." This trust fund, or Superfund, pays for the CERCLA program.

In October 1986, CERCLA was amended by SARA. SARA also added free-standing legislation which does not amend CERCLA (most notably, SARA Title III, otherwise known as the Emergency Planning and Community Right-to-Know Act). The 1990 reauthorization of CERCLA provides continuing funding for the program, but makes no changes to the statute itself. (See section 2.6 of this module for further discussion on CERCLA reauthorization.) The Community Environmental Response Facilitation Act (CERFA), which became law in October 1992, amends the

statutory language of CERCLA §120(h) which deals with the transfer of federal property.

As an Information Specialist, you are required to have a thorough understanding of the parts of SARA that amended original CERCLA provisions, as well as SARA Title V, which provides the framework for the environmental taxes that establish the Hazardous Substance Superfund and the Leaking Underground Storage Tank Trust Fund. The remainder of this module is a section-by-section breakdown of the parts of CERCLA with which you should be most familiar. The module follows the structure of the statute to help familiarize you with its content.

2.1 TITLE I — HAZARDOUS SUBSTANCES RELEASES, LIABILITY, AND COMPENSATION

Title I provides the basic framework for the Superfund process. It establishes the authority to regulate and sets notification requirements for releases, liability for releases, and the steps to follow in cleaning up a site. This section of the module references other sources of information that provide insight on the issues discussed.

DEFINITIONS

Section 101 defines terms that are critical to understanding the basics of the Superfund program. These definitions are used throughout both the statute and the codified regulations. Specific terms defined in this section that are an integral part of CERCLA include "release," "hazardous substance," and "owner or operator." For example, to understand liability under CERCLA for contamination resulting from disposal of a hazardous substance, you must first understand the definition of a hazardous substance, set out in §101(14).

REPORTABLE QUANTITIES AND ADDITIONAL DESIGNATIONS

Section 102 of CERCLA requires EPA to promulgate regulations adjusting the quantity of a hazardous substance needed to be released before the release becomes reportable. Hazardous substances have a statutory reportable quantity (RQ) of one pound, unless an RQ has been established by another statute (e.g., CWA or Clean Air Act), until EPA establishes an adjusted RQ through regulation. EPA may also designate additional hazardous substances pursuant to CERCLA §102(a).

NOTICES AND PENALTIES

Under CERCLA §103(a), a person must immediately notify the National Response Center in the event of a release into the environment that exceeds an RQ. Section 103 addresses these notification requirements, penalty provisions for failure to provide proper notification, and exemptions from reporting requirements.

Section 103(c) requires facility owners or operators to notify EPA if the facility has stored, treated, or disposed of a hazardous waste. This requirement does not apply to facilities which have been permitted or accorded interim status under Subtitle C of the Resource Conservation and Recovery Act (RCRA). The responsibility to report under §103(c), known as the "lasting provision," is still active and applicable.

RESPONSE AUTHORITIES

Section 104 gives EPA the authority to take action in order to protect human health and the environment. Where there is a release or threat of release of a hazardous substance, EPA can conduct a removal action to alleviate the immediate threats posed by the site. These actions could include, but are not limited to, fencing off the area, removing waste for safe disposal, or providing drinking water to area residents. Removal actions are specifically defined in CERCLA §101(23). Once there is no imminent danger, EPA can then use remedial action authority to develop long-term cleanup strategies as necessary to address the contamination problem. Remedial action is defined to include, "actions consistent with permanent remedy taken instead of or in addition to removal actions" (CERCLA §101(24)).

NATIONAL CONTINGENCY PLAN

The National Contingency Plan (NCP), originally established under §311(c) of the Federal Water Pollution Control Act, sets forth the process and regulations for conducting Superfund cleanup actions and is codified in 40 CFR Part 300. Section 105 required EPA to revise the NCP to reflect the statutory provisions of CERCLA and subsequently SARA. This section additionally requires the establishment of the Hazard Ranking System (HRS). The HRS is a screening tool EPA uses to help determine which sites merit inclusion on the Superfund National Priorities List (NPL).

ABATEMENT ACTION

Section 106 grants EPA the authority to compel persons to conduct cleanup activities if there is a release of a hazardous substance that presents an imminent and substantial danger to human health or the environment. Section 106 allows EPA to use administrative orders and judicial actions to direct a potentially responsible party (PRP) to conduct a cleanup. Anyone failing to comply with an order issued pursuant to §106 can be fined up to \$27,500 per day (61 FR 69359; December 31, 1996).

LIABILITY

Section 107 outlines who can be held liable for contamination pursuant to CERCLA and the costs this liability encompasses. These are known as responsible parties (RPs). When EPA is investigating contamination at a site, any person potentially covered by §107(a) can be designated as a potentially responsible party (PRP). RPs include the current owner and operator of a contaminated property, any person who

at the time of disposal of hazardous substances owned or operated the property, or any person who arranged for disposal or transportation of hazardous substances at a property where a release has occurred. Section 107(b) provides three possible defenses to liability: an act of God, an act of war, or action by a third party under certain circumstances. Section 107 also provides several exemptions from liability such as the normal application of a pesticide product (§107(i)).

FINANCIAL RESPONSIBILITY

Section 108(b) requires that EPA promulgate regulations concerning financial responsibility to cover liability under §107 of the Act. These regulations would require that any facility responsible for managing hazardous substances prove that it has the means to pay for any potential contamination at the site. No regulation to implement §108(b) of the statute has been promulgated to date.

CIVIL PENALTIES AND AWARDS

CERCLA requires RPs to perform many specific duties, such as to provide notification, retain certain records, and comply with enforcement orders. If a person fails to comply with the specific provisions detailed in §109, EPA may seek or assess civil penalties. These provisions include failure to provide proper notice, failure to provide proper records, violation of settlement agreements, and failure to comply with administrative consent orders, consent decrees, or agreements under §120. The statute divides the civil penalties into three categories which differ in respect to assessment procedures: Class I and Class II administrative penalties, and judicial penalties. A Class I administrative penalty may be assessed for not more than \$27,500 per violation, and a Class II penalty may be assessed for not more than \$27,500 per day during which the violation occurs. A civil action may be brought in the appropriate United States District Court to assess and collect a fine of not more than \$27,500 per day of violation.

EMPLOYEE PROTECTION

Section 110 grants protection to any employee who provides information that results in a CERCLA action. This section provides that no one may be fired for providing incriminating information about a facility and establishes an appeal process for any person who believes that this has occurred. Such appeals are handled by the Secretary of Labor.

USES OF THE FUND AND CLAIMS PROCEDURES

Congress appropriates to EPA money from the Hazardous Substance Superfund for the activities described in §111 of the statute. Such activities include cleanups; claims for damage to natural resources; research, development, and demonstration; and reimbursement to local governments that have conducted cleanup activities. Specific restrictions are applied to each type of activity. The procedures for asserting

a claim against the fund are detailed in §112. Section 112 also sets time constraints, known as statutes of limitations, on claims made against the fund.

LITIGATION, JURISDICTION, AND VENUE

General legal procedures applicable to CERCLA actions are established in §113. According to §113, a person may challenge any regulation promulgated under CERCLA, only by filing a petition for review in the United States Court of Appeals for the District of Columbia Circuit. A petition must be filed within 90 days of the date of promulgation of the regulations. This section also contains statutes of limitations for actions to recover response costs and damages to natural resources. According to §113(b), if an action is filed as the result of a release, venue will lie in any district in which the release occurred or in which the defendant resides. Section 113(f) provides for the legal remedy of contribution, which allows one PRP to bring suit against another PRP for the latter's share of response costs.

RELATIONSHIP TO OTHER LAWS

Section 114(a) provides that nothing in CERCLA precludes any state from imposing additional liability for the release of hazardous substances within that state. A person receiving compensation for removal costs pursuant to CERCLA may not recover costs pursuant to any other federal or state law.

AUTHORITY TO DELEGATE AND ISSUE REGULATIONS

Section 115 authorizes the President to assign CERCLA responsibilities and the power to issue CERCLA regulations to federal agencies, including EPA.

SCHEDULES

When a possible contaminated site is discovered, EPA enters information about the release into the CERCLA Information System (CERCLIS) database. Section 116 set as a goal that by January 1, 1988, EPA complete a preliminary assessment for all sites that were entered into CERCLIS prior to the enactment of SARA. Sites needing further investigation were required to undergo a more thorough evaluation by January 1, 1989. Sites that were listed in CERCLIS before the enactment of SARA were required to undergo an evaluation for the NPL by 1990. Currently, EPA must evaluate for the NPL each site that EPA concludes needs such evaluation within four years after listing on CERCLIS.

PUBLIC PARTICIPATION

Because site remediation can have significant effects on communities, SARA required that public participation activities occur throughout the Superfund process. Section 117 requires that before any remedial action is taken at a site, a public notice must be published in a major local newspaper, and an opportunity for public comment must be provided. If the community needs assistance in interpreting technical information about the hazards posed by the site, it may apply for a Technical Assistance Grant by following the procedures in 40 CFR Parts 30 and 33. After the comment period, EPA publishes a final site remedial action plan, known as a Record of Decision (ROD). If the action taken differs in any significant respect from the final plan, EPA must publish an explanation of the reasons such changes were made.

HIGH PRIORITY FOR DRINKING WATER SUPPLIES

Section 118 provides that high priority for initiating cleanup and listing on the NPL be given to facilities where the release of a hazardous substance threatens drinking water supplies or drinking water wells.

RESPONSE ACTION CONTRACTORS

Section 119 provides that contractors conducting Superfund response actions are not liable for hazardous substances released except releases which result from the contractors' negligence or intentional misconduct. The intent of this section is to reduce disincentives for contractors to engage in the cleanup process.

FEDERAL FACILITIES

Section 120 requires that federal facilities comply with the requirements of CERCLA in the same manner and to the same extent as any nongovernmental entity. If a remedial response is necessary at a federal facility on the NPL, the agency involved must enter into an interagency agreement with EPA for the remedial action to be taken by that agency. EPA's guidance entitled Federal Facilities Hazardous Waste Compliance Manual is a valuable reference document to assist in answering questions on this issue.

Under §120(h) of CERCLA, whenever the U.S. government enters into a contract to sell or transfer property, a notice must be filed with the deed, reporting any hazardous substance that has been stored for a year or more, known to be released, or disposed of on the property. Section 120(h) was amended in 1992, by the Community Environmental Response Facilitation Act (CERFA), which additionally requires the federal government, within specified deadlines, to identify "uncontaminated" property where hazardous substances or petroleum products have not been released, disposed of, or stored for more than a year. The purpose of CERFA is to identify federal lands and properties offering opportunity for reuse and

redevelopment, expedite necessary remedial and corrective actions, make the property available for sale, and where appropriate, ensure the continued liability of the federal government.

CLEANUP STANDARDS

The basic goal of a cleanup at a CERCLA site is to protect human health and the environment, preferably by significantly reducing the volume, toxicity, or mobility of contamination. The criteria used in selecting a remedy for a Superfund cleanup are identified in the NCP. The least preferred method of remediation would be transferring waste off site without prior treatment (if other treatment alternatives are available). If a remedy is selected that requires waste to remain on site, EPA must review the cleanup after five years to determine if the remedy remains protective of human health and the environment. This section also mandates that the CERCLA remedies meet or waive applicable or relevant and appropriate requirements (ARARs) of other federal and state environmental laws.

SETTLEMENTS

Section 122 sets forth different types of legal agreements that can be entered into between EPA and PRPs to conduct a response action or pay response costs at a site. Section 122 grants EPA the authority to enter into agreements with PRPs, and encourages the PRPs to enter into these settlements by offering them protection from further liability if they enter into and fulfill such agreements. When an agreement is issued for a remedial action, it must be in the form of a consent decree, and must be filed in the appropriate United States District Court. More specific information on the different types of settlements can be found in the guidance entitled the Enforcement Project Management Handbook (OSWER Directive 9837.2B).

REIMBURSEMENT TO LOCAL GOVERNMENTS

Section 123 authorizes EPA to reimburse local governments up to \$25,000 for expenses they might incur while taking temporary emergency measures in response to hazardous substance threats. To qualify for reimbursement, these emergency measures must be necessary to prevent or mitigate injury to human health or the environment. The regulations for implementing reimbursement to local governments can be found in 40 CFR Part 310.

METHANE RECOVERY

In general, §124 provides that an owner or operator of a facility that recovers methane from a landfill will not be held liable under CERCLA for a release or threatened release unless he or she were negligent.

CERTAIN RCRA WASTE

Section 125 requires revisions to the HRS to address facilities that contain substantial volumes of RCRA §3001(b)(3)(A)(i) wastes. These wastes include fly ash wastes, bottom ash wastes, slag wastes, and flue gas emission control wastes generated primarily from the combustion of coal or other fossil fuels. The revised HRS, which addresses the §125 requirements, was promulgated in the Federal Register on December 14, 1990 (55 FR 51532).

INDIAN TRIBES

Section 126 requires that EPA provide Indian tribes substantially the same treatment it would afford to states for certain provisions of CERCLA. These provisions include notification of releases, consultation with EPA over selecting an appropriate remedial action, and listing and delisting sites as priorities.

2.2 TITLE II — HAZARDOUS SUBSTANCE RESPONSE REVENUE ACT OF 1980

Title II of CERCLA amends the Internal Revenue Code of 1954 by adding three subtitles: Subtitle A - Imposition of Taxes on Petroleum and Certain Chemicals; Subtitle B - Establishment of Hazardous Substance Response Trust Fund; and Subtitle C - Post-Closure Tax and Trust Fund.

SUBTITLE A

Subchapter A of Subtitle A imposes a tax on crude oil received at United States refineries and petroleum products imported into the United States. Subchapter B of Subtitle A imposes a tax on certain chemicals sold by a manufacturer, producer, or importer. Section 4661(b) of the Internal Revenue Code contains a list of these taxable chemicals. Title V of CERCLA adjusted the amount of taxes on petroleum and certain chemicals and is discussed later in this module.

SUBTITLES B AND C

Subtitles B and C of Title II were repealed by Title V of SARA.

2.3 TITLE III — MISCELLANEOUS PROVISIONS

Title III of CERCLA encompasses §§301-312 of the Act and includes various provisions such as citizen suits, reports and studies, and research, development, and demonstration. A few of the more commonly used sections are summarized below.

Section 301(h) requires the Administrator of EPA to submit an annual report to Congress on progress achieved in implementing the Act during the previous fiscal year. These reporting requirements generate documents that are used by Information Specialists and are requested by callers.

Section 310 grants citizens authority to bring a civil action against any other person (including the United States) for violation of any standard, regulation, condition, requirement, or order under CERCLA. A civil action may also be brought against the President or other government official for failure to perform any nondiscretionary duty under CERCLA. The district court in which the action is brought has the jurisdiction to enforce the standard, regulation, condition, requirement, or order, and order action to correct the violation and impose any civil penalty provided for the violation. The court also has the jurisdiction to order the President or any other government official to perform the act or duty concerned.

Section 311 establishes research, development, and demonstration programs for technologies that offer alternatives to conventional methods of handling site cleanups. Section 311(b) authorizes EPA's Administrator to carry out a program of research, evaluation, testing, development, and demonstration of alternative or innovative treatment technologies which may be used to protect human health and the environment. Section 311(d) calls for the establishment of centers for hazardous substance response and research.

Title III of CERCLA should not be confused with Title III of SARA, which amended CERCLA. Whereas Title III of CERCLA contains miscellaneous provisions related to the Superfund program, Title III of SARA is a free-standing act that promulgated the Emergency Planning and Community-Right-to-Know Act (EPCRA).

2.4 TITLE IV — POLLUTION INSURANCE

Title IV, added by SARA, outlines the legal requirements related to the issuance of pollution liability insurance. This type of insurance is intended to help a business entity protect against the losses that might occur because of its involvement at a Superfund site. The enormous costs of Superfund cleanups prompted the insurance requirement. Title IV clarifies the interactions between state and federal insurance laws and pollution liability insurance, and defines specific legal terms.

2.5 TITLE V — AMENDMENTS TO THE INTERNAL REVENUE CODE OF 1986

Title V of CERCLA, also called the Superfund Revenue Act of 1986, extended the taxing authority of CERCLA and adjusted the amount of taxes on petroleum and certain chemicals. A few of the more pertinent sections are summarized below.

Section 516 adds section 59A of chapter 1 to the Internal Revenue Code of 1986. This section, environmental taxes, imposes an income tax on corporations as a means of adding to the Superfund. It affects all companies with a modified alternative minimum taxable income of more than \$2 million, and is not restricted to petroleum and chemical companies.

Section 517 establishes the Hazardous Substance Superfund by amending chapter 98 of the Internal Revenue Code of 1986. This section outlines the requirements for payments into and out of the Superfund and the restrictions relating to use of the money.

Title V also provides for the establishment, in §§521 and 522, of a Leaking Underground Storage Tank (LUST) Trust Fund, which can be used to pay for cleanup of releases from petroleum underground storage tanks. The LUST Trust Fund is financed by a one-tenth of a cent per gallon tax on the sale of motor fuels.

2.6 REAUTHORIZATION

The taxing authority of SARA was to expire on December 31, 1991; however, the Omnibus Reconciliation Act of 1990 extended the taxes without modification for four years, through December 31, 1995. This extension allowed the program to continue at a \$1.7 billion annual authorized level. Separately, the Superfund program was reauthorized, without changes to the text of the statute, until September 30, 1994, a three-year extension from the expiration date of the SARA authorization in 1991. Congress failed to reauthorize the Superfund program before September 30, 1994 (the end of the fiscal year), however, the program is still operating because funding continues to be appropriated to the Superfund program. As of January 1, 1998, Congress had taken no action to reauthorize CERCLA.